

Millwrights Union Local 102, United Brotherhood of Carpenters & Joiners of America, AFL-CIO and Frederick Meiswinkel, Inc. d/b/a Meiswinkel Interiors and Carpenters Union Local 2006, United Brotherhood of Carpenters & Joiners of America, AFL-CIO; Carpenters Union Local 316, United Brotherhood of Carpenters & Joiners of America, AFL-CIO. Case 32-CD-50

March 16, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Frederick Meiswinkel, Inc. d/b/a Meiswinkel Interiors, herein called the Employer, alleging that Millwrights Union Local 102, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called the Millwrights, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Carpenters Union Local 2006, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called Local 2006, and/or Carpenters Union Local 316, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called Local 316.

Pursuant to notice, a hearing was held before Hearing Officer John D. Meakin on April 23, 1981. All parties appeared¹ and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that Frederick Meiswinkel, Inc. d/b/a Meiswinkel Interiors, is a California corporation with corporate offices in

San Francisco, California. The offices of Meiswinkel Interiors are located in Santa Clara, California. The Employer is principally engaged in the preparation for, and installation of, computer floors, drywall, and demountable walls on commercial or industrial jobsites. During the past year, the Employer purchased goods valued in excess of \$50,000 from suppliers located in the State of California, which goods were received by those suppliers directly from points located outside the State of California. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Local 316, Local 2006, and the Millwrights are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background

The Employer was awarded a subcontract by Valhalla Builders and Contractors to perform the installation of the computer floor at the IBM jobsite located at Building 5, 560 Cottle Road, San Jose, California. The Employer assigned the work jointly to employees represented by Locals 316 and 2006. The Employer has utilized approximately 10 employees on this project.

The project involves installation of approximately 11,600 square feet of false or raised floor. Computer equipment, software, and other electronic equipment will be mounted on this computer floor and all the attendant electrical or trunk cables are to be installed beneath. (Installation of the equipment and cabling is performed by another company.) Computer floors are built on top of the structural floor of the building. The structural floor is usually reinforced concrete. The Employer is responsible for installing pedestals, laying a steel framework on top of the pedestals, and attaching floor panels to the steel framework. Computer floors are raised 6 to 30 inches higher than the structural floor and are required to be level to very precise tolerances (one-sixteenth of an inch deviation in 10 feet). The Employer testified that this precise tolerance requires a great deal of site preparation and specific employee skills in leveling the surface. The pedestals, framework, and floor panels are manufactured by a separate company off the jobsite (out of state) and shipped to the jobsite to be uncrated, assembled, and installed once the site

¹ However, for reasons discussed *infra*, Attorney Michael B. Roger, counsel for all three of the Unions, left the hearing room shortly after the hearing opened.

preparation is completed by employees of the Employer.

On March 18, 1981, Carl Erickson, a business agent for the Millwrights, approached the Employer's superintendent, Bruce Johnson, at the jobsite and claimed the computer floor installation as millwrights' work. When Erickson returned later that month and found that the Employer had hired no millwrights, he threatened to file grievances against the Company and to bring internal union charges against Superintendent Johnson, a member of Local 316.

On March 31, 1981, the Millwrights filed a grievance against Valhalla, the primary contractor at the IBM jobsite. The next day Valhalla's secretary-treasurer, Robert Casella, was contacted by a Local 316 business agent, Elmer Phillips, who claimed that millwrights should be given the work, and threatened both to file a grievance against Valhalla over the Employer's failure to use millwrights and to close down all the jobs at the IBM site. During this conversation, Phillips told Casella to call "his boss," (i.e., Phillips' boss) referring to the Millwrights business agent, Jim Green, and explain the Employer's position to Green. That same day Casella called Green to inform him that he received a threat from Phillips and to ask for the Millwrights position. Green claimed that the work in dispute should be given to millwrights.

On or about April 2, 1981, Superintendent Johnson called Tony Pagan, business agent for Local 2006, about the dispute. Pagan stated that computer floor work was always assigned to carpenters. Johnson then called Phillips. Phillips said millwrights should do the work. Phillips repeated his threat to shut the job down if the work was not given to employees represented by the Millwrights.

On April 10, 1981, the Millwrights sent a telegram to the Employer stating that grievances had been filed against the Employer and would be processed over assignment of the computer floor work at the IBM jobsite.

The computer floor at the jobsite is approximately 95 percent complete. As of the date of the hearing the entire project had been halted by the owner for reasons apparently unrelated to this dispute. Until the job was halted, installation for the computer floor continued to be performed by employees represented by either Local 316 or Local 2006. No employees represented by the Millwrights have been employed by the Employer on this jobsite or elsewhere.

On April 3, 1981, the Employer filed the instant charge, alleging that the Millwrights had violated Section 8(b)(4)(D) of the Act by the aforementioned threats and by the filing of the aforemen-

tioned grievances in order to force the Employer to assign the work in dispute to employees represented by the Millwrights.

B. The Work in Dispute

The work in dispute consists of the installation of the computer floor in Building 5 at the IBM jobsite at 560 Cottle Road, San Jose, California.

C. Contentions of the Parties

Shortly after the hearing opened, Attorney Michael B. Roger, counsel for all three of the Unions involved, left the hearing room stating that because of a possible conflict of interest he would not be participating further in the hearing. Thereafter, the evidence in this case was developed through employer witnesses and documents. However, in his opening statement made prior to his departure, Roger had stated that "it is the belief of each of the [three] labor organizations that there are existing procedures within their own International Union, and within the collective-bargaining agreement, or agreements to which this Employer may be bound, which require a resolution of any such claim to the dispute through proceedings that do not involve the activities of the National Labor Relations Board."

Subsequently, on or about April 28, 1981, Roger, acting on behalf of Local 316, Local 2006, and the Millwrights, sent a telegram to the Regional Office of the Board,² in which he, *inter alia*, stated that all three Unions disclaimed the work in dispute, and contended that, as the disclaimer resolved the issue, the notice of hearing should be quashed and the case dismissed.

The Employer contends that there is reasonable cause to believe that the Millwrights violated Section 8(b)(4)(D) of the Act by seeking to compel, through threats to picket and the filing of grievances, the assignment of the disputed work to employees represented by it. The Employer contends that there is no agreed-upon method for the voluntary resolution of this dispute which is binding upon all parties to this proceeding. On the merits, the Employer contends that the disputed work should be awarded to employees represented by Local 316 and/or Local 2006 on the basis of the Employer's original assignment and preference, area practice, and consideration of efficiency, economy, and skills.

² The telegram was received by the Region on April 30, 1981, a week after the hearing had opened and closed.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

With respect to (1) above, it is not disputed that a representative of the Millwrights approached a supervisor of the Employer and claimed the work in dispute for employees represented by the Millwrights. After later finding out that the Employer had not hired any such employees, the same representative threatened to file grievances against the Employer and to bring internal union charges against the Employer's superintendent, Bruce Johnson, a member of Local 316. Subsequently, it apparently filed a grievance against the Employer over the assignment of the disputed work. Since it is clear that these threats, as well as the grievance, were made in furtherance of the Millwrights claim to the disputed work, we conclude there is reasonable cause to believe that the Act has been violated as charged. See *United Food and Commercial Workers International Union, District Union 227, AFL-CIO (The Kroger Co.)*, 247 NLRB 195, 196 (1980). This conclusion is also supported by evidence which shows that the Millwrights filed a grievance against Valhalla, a neutral employer, in an attempt to pressure the Employer to assign the work in dispute to that Union. Because the Millwrights filed the grievance against Valhalla solely to satisfy a jurisdictional claim, such grievance was without merit, and its filing was coercive within the meaning of Section 8(b)(4)(ii) of the Act. See *Brotherhood of Teamsters & Auto Truck Drivers Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Pacific Maritime Association)*, 224 NLRB 801, 805-808 (1976). Finally, we note that Elmer Phillips, business agent of Local 316, threatened to file grievances against Valhalla over the Employer's failure to use employees represented by the Millwrights and threatened to close down all the jobs at the site if the work was not assigned to those employees. Although a Local 316 business agent, in the context in which the claims and the threats were made, we find that there is reasonable cause to believe that Phillips was acting on behalf of the Millwrights in making these threats. Thus, Phillips claimed work for the Millwrights which had originally been assigned to employees represented by his own Local, thereby advocating a position contrary to the interest of his own Union, and told the Employer's agent to check the Millwrights claim

to the work with "his boss," referring to the Millwrights business agent. When contacted, the Millwrights business agent made no effort to disavow Phillips' remarks, or to disassociate himself from Phillips' comments.

Accordingly, we find there is reasonable cause to believe that the Millwrights engaged in all of the foregoing conduct with an object of forcing and requiring the Employer to assign the disputed work to employees it represented, and that, therefore, Section 8(b)(4)(ii)(D) of the Act has been violated.

With respect to (2) above, we find that there is no agreed-upon method for the voluntary settlement of the dispute. The jurisdictional dispute provision of the Drywall/Lathing Master Agreement to which all parties in the dispute are bound does not give an employer any role in jurisdictional dispute resolutions and does not obligate signatory carpenter unions to resolve such disputes in a specified manner. However, included in the Drywall/Lathing Master Agreement is a general provision, section 7, article I, which provides in pertinent part that if a contractor does "related carpentry work as specified in local area carpenter master agreements, he shall do so under the terms and conditions of the then current appropriate master agreements in said areas." There are two area master Carpenters agreements which arguably might be included within the terms of this provision: the Northern California Home Builders Conference Agreement, herein called the Home Builders Agreement, and the Associated General Contractors of Northern California, Inc., Bay County General Association, Inc., Agreement, herein called the Bay Counties Agreement. Both of these agreements provide for agreed-upon methods for determining jurisdictional disputes. However, the Employer specifically contends that it is not bound to either the Home Builders Agreement or the Bay Counties Agreement by the aforementioned section of the Drywall/Lathing Master Agreement, and no evidence was submitted to refute that contention. Although attorney Roger did contend that there existed procedures for the voluntary settlement of this jurisdictional dispute, he did not identify the procedures or present evidence supporting that contention. In any event, we conclude that section 7, article I, of the Drywall/Lathing Master Agreement is too vague and ambiguous concerning the scope of its application to the Home Builders and Bay Counties Agreements to enable us to determine whether its terms were intended to incorporate the agreed-upon methods for resolving jurisdictional disputes set forth in those two agreements.

Accordingly, we find there is no agreed-upon contractual method for the resolution for the instant jurisdictional dispute. Nor have the parties voluntarily agreed upon any other procedure to resolve this dispute.

As to the Millwrights contention that this proceeding should be dismissed because all three Unions have disclaimed the disputed work, we find that the disclaimer was filed as a ruse for the Unions to avoid the Board's determination of the instant dispute, and that it is therefore not entitled to be given any effect.

The Board will not honor a hollow disclaimer; that is, one submitted for the purpose of avoiding an authoritative decision on the merits. See, e.g., *Laborers' International Union of North America, Laborers' District Council of Western Pennsylvania and Local 910, AFL-CIO (Brockway Glass Company, Inc.)*, 226 NLRB 142 (1976). Here, the Unions did not disclaim the work until after the hearing had closed and at a time when no work of any kind was being performed at the site, as the project's owner had stopped all work there for reasons unrelated to the instant dispute. This cessation of work had occurred before the hearing commenced, and there is no evidence that any work on the project, including that in dispute, had been resumed as of the filing of the disclaimer. In these circumstances, we conclude that the disclaimer constituted an empty gesture. Not only had the hearing been held without any indication before its completion that the Unions were no longer seeking the work,³ but none of the Unions was giving up much of anything by disclaiming the disputed work because, in reality, there was no work to disclaim. Further, since the disclaimer came after all work had been halted, it could not have had an impact on the employees who had been performing the work. Thus, we are unable to determine whether, had work not been stopped, employees who were represented by Locals 316 and 2006, respectively, would have complied with the disclaimer or instead would have ignored it and continued to do the work. A disclaimer in these circumstances is virtually meaningless because its effectiveness cannot be tested.⁴

³ In this regard, we note that the disclaimer was not filed until a week after the close of the hearing and that at the hearing there had been no hint that a disclaimer would be forthcoming or that one even was being contemplated. The asserted defense was that some unspecified voluntary method existed to resolve the dispute.

⁴ In this regard, the Employer asserts in its brief that employees represented by Locals 316 and 2006 have continued to perform the identical work at other of the Employer's jobs in the area. The Unions have not contested the truth of this assertion and, consequently, we have accepted the assertion as fact. Thus, while the disclaimer is limited to the work at the site in question, the ongoing performance of similar work elsewhere for the Employer suggests that the employees who had been performing the disputed work might well have continued to perform it regardless of the disclaimer. It is well settled that the continued performance of work

Finally, we view the disclaimer as a sham because the Unions throughout this proceeding have been represented by the same counsel, who has spoken for all of them as one voice. At the least, such common representation implies a conflict of interest,⁵ particularly where, as here, the interests of Locals 316 and 2006 and the employees they represent are at odds with the interests of the Millwrights and the employees it represents concerning the disputed work. Consequently, there is no reason to believe that, absent their common representation in this matter, any one of the Unions would have disclaimed the work of its own volition without regard to the actions of the other two. In other words, the Unions' common representation indicates that their decision to disclaim the work was not reached at arms' length. As a result, the disclaimer is not worthy of belief.

Accordingly, since there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, we find that this dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.⁶ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.⁷

1. Collective-bargaining agreement

All the parties in this proceeding are bound to the Drywall/Lathing Master Agreement. This agreement is primarily concerned with work involving walls and ceilings. It does not specifically cover the installation of computer floors. Accordingly, we find that this factor does not favor any group of the employees involved.

2. Past practice of the Employer

In the past the Employer has always awarded work similar to that in dispute to carpenters who are represented by Locals 316 and 2006. Bruce

in dispute by employees assigned to it nullifies the effect of a disclaimer filed by the union representing them. See, e.g., *International Union of Elevator Constructors, AFL-CIO, Local Union No. 1 (Elevator Industries Association and Millar Elevator Industries, Inc.)*, 229 NLRB 1200, 1202 (1977); and *United Steelworkers of America, AFL-CIO and its Local No. 4454 (Continental Can Company, Inc.)*, 202 NLRB 652, 654 (1973).

⁵ Counsel himself acknowledged that his common representation of the Unions gave at least the impression of such a conflict.

⁶ *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO (Columbia Broadcasting System)*, 364 U.S. 573 (1961).

⁷ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

Johnson testified that, during the year he has been superintendent for the Employer, the Employer performed between 43 to 50 installations of demountable walls and computer floors, and has always assigned the work to carpenters rather than to millwrights.

We conclude that this factor favors an assignment to employees represented by Locals 316 and 2006.

3. Employer's assignment and preference

The Employer has assigned the disputed work, and prefers an assignment, to employees represented by Locals 316 and 2006. These factors favor an assignment to the employees represented by Locals 316 and 2006.

4. Relative skills

Johnson testified that computer installation requires a high level of skill in order to construct a floor with less than one-sixteenth of an inch of height variation within a 10-foot square, so as to keep a completely perfect balance. These skills are possessed by employees represented by Locals 316 and 2006. In contrast, Johnson testified that employees represented by the Millwrights do not have the skills to perform the work in dispute in an efficient and economical manner. We find that this factor favors an award of the work in dispute to employees represented by Locals 316 and 2006.

5. Economy and efficiency of operations

Superintendent Johnson testified that the Employer does both demountable walls and computer floors; and that carpenters represented by Locals 316 and 2006 can be, and are, used by the Employer to do both kinds of work while he had never heard of millwrights doing demountable work. Thus, because of their versatility, it is more economical and efficient for the Employer to use carpenters represented by Locals 316 and 2006.

We conclude that this factor favors an award of the work to employees represented by Locals 316 and 2006.

6. Area and industry practice

Of six competitors of the Employer in the northern California area, five use exclusively carpenters for computer floor work and the sixth uses carpenters primarily with a few millwrights. In southern California five companies which do computer floors use carpenters primarily. There was testimony that in the Eastern and Southwestern United States carpenters rather than millwrights are used to install computer floors. No evidence was presented as to other areas.

We therefore find that the factors of area and industry practice favor the award of the disputed work to employees represented by Locals 316 and 2006.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Locals 316 and 2006 are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's past practice, assignment and preference, the relative skills possessed by these employees, economy and efficiency of operations, and area and industry practice, all of which favor an award of the disputed work to the employees represented by Locals 316 and 2006. In making this determination, we are awarding the work in question to employees who are represented by Locals 316 and 2006, but not to those Unions or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

Scope of Determination

The Employer contends that the award by the Board should be broad due to the fact that there is reason to believe that the Millwrights will continue to claim such work in the future at other jobsites of the Employer. The Millwrights has stated no position on this issue.

The record does not support a finding, required for the granting of a broad order, that the dispute is likely to recur in a broader geographic area than the site here involved. Our present determination is therefore limited to the specific site where the instant dispute arose.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Frederick Meiswinkel, Inc. d/b/a Meiswinkel Interiors, who are represented by Carpenters Union Local 316, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and Carpenters Union Local 2006, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, are entitled to perform the installation of computer floors in Building 5 at the IBM jobsite at 560 Cottle Road, San Jose, California.

2. Millwrights Union Local 102, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, is not entitled to perform the work proscribed by

Section 8(b)(4)(D) of the Act to force or require Frederick Meiswinkel, Inc. d/b/a Meiswinkel Interiors, to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Millwrights Union Local 102, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, shall notify the Regional Director for Region 32, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

MEMBER FANNING, dissenting:

I would honor the disclaimer by Millwrights Local 102 and quash the notice of hearing for the reasons set forth in my dissenting opinion in *Labor-*

ers' International Union of North America, Laborers' District Council of Western Pennsylvania and Local 910, AFL-CIO (Brockway Glass Company, Inc.), 226 NLRB 142 at 145 (1976). In my view, the validity of the disclaimer is unaffected by the common legal representation of the three labor organizations involved. Further, I find no relevance at all in the fact that two of the labor organizations which are not respondents performed similar work for the Employer elsewhere which is not in dispute. Even assuming, for the sake of argument, the relevance of that fact to the validity of their disclaimer of the work which is in dispute, it casts no shadow at all upon the disclaimer by Respondent. Without a competing claim from Respondent, there is no jurisdictional dispute.

Accordingly, I would quash the notice of hearing.